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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMANN, APPELLANT,
v.
VIVIAN J. FAGIN, UNITED STATES MARSHAL for the Southern District of Ohio. } No. 627.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

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1.

Materiality of the "perjury," if committed.

I do not mean by suggesting this point to foreclose the Government from just pursuit of Mr. Ballmann on any charge to which he may be legally liable. It is proper to suggest, however, that not every false statement in testifying will support a charge of perjury. The matter to which the false statement relates must be material to the issue and tend to prove a fact bearing on the issue. It is when the false swearing goes to a point the existence or non-existence of which can not affect the question in dispute that it does not tend

to prevent the due administration of justice, and therefore is not perjury. (Whart. Crim. Law, 10th ed., Vol. II, secs. 1245, 1276, 1277; *United States* v. *Shinn*, 14 Fed. Rep., 447; *Pollard* v. *People*, 69 Ill., 153; *Com.* v. *Grant*, 116 Mass., 17.) Here the grand jury were at the first stage of an investigation. The particular matter, though material in one sense and important, was preliminary. The vital elements had not yet been reached. The inquiry at that stage did not perhaps relate to an essential feature going to the heart of the substantive transactions. I simply submit to the court the question whether the false statement as to the cashbook (guarded as it was by references to dates and specific named accounts) was material in the sense of constituting perjury; and whether, therefore, Ballmann's danger on this ground was imaginary or real.

2.

Perjury in testifying is justly excepted from protection and the privilege.

It seems incredible that this could be doubted. The guarantee has existed for nearly a hundred and twenty years, and no one, apparently, has had the hardihood to advance the contrary claim during all that period until now. If the claim is well founded the guarantee must be revised and amended forthwith, for otherwise the wheels of criminal justice will stop. If the provision that no person in any criminal case shall be compelled to be a witness against himself does not refer to past occurrences, and, at all events, includes false

swearing before a grand jury whose investigation itself makes the criminal case in which the privilege is invoked, then all that is necessary to give immunity to crime is to be sworn, to lie deliberately, and then to be silent. That is simply a premium on crime, an invitation to perjury, and a safe defense to the main crime which is under inquiry, for nothing could ever be discovered. Take a very likely case: Only a few witnesses available, but, whether few or many, all friendly to an offender not yet tracked, anxious or willing to shield him, hostile, therefore, to the prosecution. They agree among themselves to swear falsely before the grand jury and then to stand on the privilege on the ground of liability to perjury. Retributive justice would stop entirely and criminals go undiscovered and unwhipped. A deliberate lie under oath, a deliberate crime, in other words, is its own complete protection, and complete protection to the utterer's accomplices or friends respecting the previous offense. Now, I do not doubt that *any* previous offense is within the protection, even, perhaps, a previous perjury in testifying; I mean a perjury, on some judicial occasion, by some written or verbal statement under oath, uttered *before* the grand jury convened and began the inquiry. It can not be doubted that except for the liability to *further* discovery pointed out in the *Counselman* decision, section 860, Revised Statutes, protects a witness from prosecution based on his evidence as fully as the constitutional guarantee. But section 860 excepts "perjury committed in discovering or testifying as

aforesaid." This shows clearly, it seems, that it is not the offense of perjury in itself, committed on some previous occasion, which is excepted, but only perjury in giving the evidence which can not be adversely used—perjury on the immediate occasion, as here, before the grand jury.

In showing why the exemption of section 860 was imperfect and short of the guarantee, the *Counselman* decision did *not* refer to the complete exception of the particular offense—perjury in giving the very evidence barred from adverse use—as an additional reason. This is very significant. I submit that always and necessarily and on unanswerable principle this exception is valid, and that the reason why we do not find, after careful search, numerous or exact authorities on the point is because the underlying doctrine has not been and can not be challenged. The grounds for the exception in morals, law, and social science (as indicated, for example, in Wigmore, *ante* main brief, p. 23) are imperative and irresistible.

Section 860 is a mere condensation of the act of February 25, 1868 (15 Stat., 37). The original bill was introduced in the Senate. There had been no previous legislation on the subject. Neither in the Senate nor the House do the debates throw any light upon the matter. (Cong. Globe, 40th Cong., 2d sess., pp. 950, 951, 1334.) Apparently no one ever doubted the sufficiency of the protection and the constitutionality of the proviso.

The law of the State of Kentucky punishes gambling and exempts witnesses from liability to prosecution for that offense, but excepts perjury from that exemption, like the Federal statute. (Stat. of Kentucky, sec. 1973.) In *Com.* v. *Turner* (Ky.) (33 S. W. Rep., 88), it was stated that the purpose of the legislature is to punish at all hazards the offense of false swearing, and no doubt is expressed as to the validity of this provision. The defendant there, as a witness in another case, had been compelled by the court to answer certain questions against his protest and claim of privilege. He was indicted for false swearing in his answers. The trial court charged the jury that if they found he swore under compulsion they should acquit. This instruction was reversed on appeal, the court holding that the decision of the trial court in the original case that the questions and answers were not under the constitutional protection was conclusive and could not be reviewed by another trial court in a subsequent trial for perjury by a witness in the original case. The court held, however, that while any criminative testimony given by a witness under such circumstances might not be used to convict him in a prosecution for the offense of which he had thus criminated himself, "yet, where he testifies, whether willingly or unwillingly, he must tell the truth or make himself amenable to the law against false swearing."

> Here, then, we find the manifest policy of our laws to punish, under all circumstances, this heinous offense of false swearing. By the

> express terms of the statute the witness in these cases who may criminate himself is not only exempted from prosecution for the particular offense disclosed by his testimony, but this testimony can be used against him for no other offense except that of false swearing or perjury. The policy is a sound one and in the interest of good morals, and for the protection of society should be upheld and fostered by the courts (p. 89).

Many English statutes contain similar provisions as to perjury. In *Queen* v. *Hulme* (L. R. 5 Q. B., 377), which arose under the Corrupt Practices Prevention Acts (15 and 16 Vict., c. 57; 26 and 27 Vict., c. 29), Blackburn, J., referring to the proviso that no statement made by a witness in proceedings under these acts should be admissible in evidence in any proceeding, civil or criminal, except in cases of perjury, said (p. 385):

> I think it is clear that whenever the legislature in this act requires a person to answer questions the meaning is that he shall answer them truly, to the best of his knowledge and belief; it is clear also in this act that where the witness gives false evidence in answer to any question he shall be liable to be indicted for perjury. I think it is clear the obligation intended to be thrown upon the person who is called as a witness is that he shall answer every question truly.

It appeared that under these acts a witness was not excused from answering on the ground that he might thereby tend to criminate himself, but was entitled to a certificate of indemnification stating that he had

made true disclosure, etc., which should operate as a stay to any proceedings that might be instituted against him *for violation of the election laws* (the previous substantive offense). As to these features of the law, and replying to the contention that the law did not require every answer to be true, Lush, J., said (p. 389):

> At common law a person, having a question put to him the answer to which may tend to criminate himself, can excuse himself from answering. The legislature says, in order to get at the truth in these matters, he shall not have that excuse, he shall be bound to answer; and, further, it says that if he gives a false answer to any question put to him, he shall be liable to the pains and penalties of perjury, a further measure in order to enforce speaking the truth, enabling the commissioners to elicit information. I should be very much surprised to find in an act of Parliament which made a false answer a criminal offense anything which would amount to a premium upon giving a false answer; it was intended to make up to the witness for what they have taken away from him in the way of common-law privilege. Whereas at common law a witness is excused from answering a question the answer to which would tend to criminate himself, because if he gave the answer it might be used as evidence against him, it is said, "You shall answer, but no statement made by you in answer to any question put shall, except in cases of indictment for perjury, be admissible against you in evidence in any case, either civil or criminal." * * *

So that a witness may be indicted for perjury. The general principle of protection from the consequences of evidence furnished by himself does not protect him here. On the same principle he can not refuse to answer on the ground that he will reveal his own perjury, committed earlier in the same examination. As to the liability for prosecution for perjury, the point has frequently been decided in this country. For instance, in *State* v. *Faulkner*, a recent case. (Supreme Court of Missouri, 75 S. W. Rep., 116; see also *Mackin* v. *People*, 115 Ill., 312.) In the *Faulkner case* the grand jury was investigating charges of municipal bribery, and the witness swore he knew nothing of a certain corruption fund. In fact, he had knowledge of the fund and the purpose for which it was to be used. He was indicted for perjury and convicted. The point was made on his behalf that a witness in his situation—that is, not under arrest for a crime, but summoned before the grand jury in the investigation of the guilt of others—could fail to claim his constitutional privilege, or waive it, and testify falsely and be absolutely exempt from prosecution for perjury. The court said:

> The proposition, reduced to its last analysis, is that, as no person can be compelled to testify against himself, he may waive his privilege, testify falsely, and yet incur no liability for perjury. In another form it may be stated that, since he can not be compelled to incriminate himself, and as by testifying falsely he does incriminate himself by committing perjury,

> therefore he can not be prosecuted for it. Two answers readily suggest themselves to this proposition that the witness in such circumstances is justifiable in committing perjury, and they are these: First, he may refuse to answer, and, if the court shall deny his privilege, and commit him, he can be released on habeas corpus; or, second, if he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it can not be used against him on the trial. So that two lawful avenues are open to him by which he may avoid the road to perjury and a prosecution therefor. (75 S. W. Rep., p. 137.)

And in the *Mackin case* the court said:

> Such an investigation would be utterly futile, and even a farce, if witnesses might testify falsely and no perjury could be assigned on such corrupt and false testimony. * * * Unless witnesses, when called before the grand jury in such cases, can be compelled to speak the truth, it would be impracticable to detect crime. The very object of the inquest is to ascertain whether crime has in fact been committed. (*Mackin* v. *The People*, 115 Ill., at pp. 323, 324.)

When in the *Faulkner case* the Supreme Court of Missouri said, "If he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it can not be used against him on the trial," it means, of course, an indictment for the substantive offense into which the grand jury are inquiring. It may be that the witness here could have

refused to answer at the outset any question whatever, on the ground that he would criminate himself; but it is impossible to sustain the contention that, having chosen to answer after being sworn, and stating a deliberate and willful falsehood, he is then exempt in the same proceedings either from prosecution for his perjury or from the necessity of revealing it by being compelled to answer other questions. In other words, he may be prosecuted for perjury, and yet he can not invoke his privilege to save himself from that prosecution. If that danger here is real, the appellant has chosen to run the risk and must take the consequences; he can not avail of his own deliberate offense to protect himself from its results.

To state the proposition in another form—the reason for excepting perjury from the exemption is manifestly this: The object of such statutes is to enable the Government to obtain information as to crimes that have been committed. The constitutional privilege is overcome by protecting the witness against the effects of his disclosures. But if he could testify falsely with impunity, the object of the statute would be defeated, the desired information could not be obtained, and he would receive without consideration the benefit of the exemption. In other words, he would be enabled, by the statute itself, to thwart the administration of justice by committing another crime—perjury—without fear of punishment. If the danger of exposing oneself to the charge of perjury, by reason of previous answers in the same judicial examination, were a valid

reason for a witness refusing to answer other questions, then a witness could, by previously testifying falsely (as I have already pointed out), make privileged matters which otherwise would not be privileged. And that is this case, if, as Ballmann's counsel suggested before Judge Thompson, the reason for his refusing to answer the questions put by the grand jury as to the reference of the folio numbers on the ledger, is that he may have committed perjury in previously denying the existence of the cash book.

Perjury is not only a crime in all codes of law, but false swearing is a sin in codes which are religious, as well as legal and political—like the Ten Commandments. Not only is the coming of the witness essential to the safety and health of the community's life and the continuous transaction of its affairs, but his veracity is essential when he comes. Irresistible considerations of public policy, which underlie the law, demand that false swearing shall be punished and that false swearing shall not block the machinery of justice.

I believe the fundamental proposition here was established and determined, *ex necessitate*, long before modern codes of law were framed, and that it controls their interpretation; but, so far as it may be argued that this proposition is undetermined, I submit to the reason and conscience of the court this final statement: That a constitutional guarantee against self-incrimination in any criminal case, although such a case includes a grand jury's inquiry respecting other parties than the witness, necessarily refers to previous unlawful

transactions and can not include deliberate false swearing before the grand jury itself at an earlier stage of the same examination.

It is significant that the amended and complete protection against prosecution or penalty under the interstate-commerce laws approved in *Brown* v. *Walker*, contains the same exception as to perjury. The opinion in that case did not consider the exemption defective on that account.

3.

The opposing brief.

Appellant contends (Brief, Subdivision IV) that there was evidence before the District Court suggesting that an answer to the question or the production of his books might implicate the witness:

1. On the ground that he "was already charged with criminal contempt for having failed to produce a cash book before the grand jury on the day before and on the morning of the same day, and was subject to be further prosecuted, if he had any books in his possession, for disobedience of the sweeping order of April 7, which directed him to produce all books."

This is simply saying that his disobedience of the first order of the court was a justification of his refusal to obey its final order. It is manifest that the object of all these orders was the production of the cash book, and he was adjudged in contempt only for failing to produce that book specifically referred to by the final order.

2. On the ground that the testimony of Dieterle, the foreman of the grand jury, disclosed "that Ballmann

had testified before the grand jury that he had not used a cash book in his business during December, 1904, and January, February, March, and April, 1905," and "an affirmative answer to the questions propounded by the grand jury, or the production of a cash book, might, therefore, have led to the indictment and conviction of the witness for perjury."

Here, again, he relies upon his own wrongful act in the same investigation to protect him in committing a further wrong and make privileged matters not otherwise privileged. The question of the admissibility of this plea of perjury has been already discussed.

3. Because Oppenheimer's petition and other similar suits pending against him in the Ohio courts showed that he was being civilly sued to recover back losses under the statutes of Ohio against gambling and bucket shops, and that he was charged in verified petitions with being engaged in an unlawful business.

The obvious answer to this claim is that this evidence was not before the District Court. The facts here stated were first set up in the petition to the Circuit Court for a writ of *habeas corpus.* It is submitted that these statements have been improperly injected into the case. The question before the Circuit Court upon habeas corpus, and before this court upon this appeal, is whether, *upon the evidence before it,* the District Court had jurisdiction to commit Ballmann for contempt.

But supposing that such evidence were admissible, appellant's argument fails:

(1) Because no connection is shown between the questions asked and the criminal proceedings suggested.

(2) Because disclosures made before a Federal grand jury could not be used in prosecutions in the State courts. (See original brief, pp. 48, 49.)

As to the contention that the existence of the cash book was not proved.

The existence of the book was proved by Ballmann's own employees. The District Court merely held that there was no evidence to show that it had been destroyed. This is very far from holding that the existence of the book was to be assumed from the failure of the appellant to show that it had not been destroyed.

The courts below did not in this respect assume guilt and require Ballmann to establish his innocence. The fact of the existence of the book having appeared, they merely held, and legitimately, that it was incumbent on him to explain its disappearance or state why he could not. They held, rightly, that when the existence of the book had been found as a fact, he could not take refuge in absolute silence.

Section 860, Revised Statutes, does not protect the voluntary statements of witnesses.

Exception is taken to Foreman Dieterle's evidence that Ballmann had testified before the grand jury that he had not used a cash book in his business.

It is not contended, as it could not be, that testimony as to what took place before the grand jury was inadmissible in this contempt case. (See 17 A. and E. Ency. Law, 2d ed., p. 1294, and cases cited.) A most

instructive and well-considered case in this connection is *State* v. *Broughton*, 7 Ired. (29 N. C.), 96. (See also *People* v. *Northey*, 77 Cal., 618; *People* v. *Kelley*, 47 Cal., 126; *People* v. *Young*, 31 Cal., 564; *United States* v. *Kirkwood*, 5 Utah, 123; *People* v. *Reggel*, 8 Utah, 21, holding that the rule of secrecy is not for the benefit of witnesses.)

Appellant contends, however, that section 860, Revised Statutes, protects him against the use against himself of anything that he disclosed before the grand jury, and therefore the foreman's testimony as to what he said was inadmissible.

But what he said, so far as testified to by the foreman, was said voluntarily, and therefore is not protected by section 860, any more than by the rule of the common law.

This was expressly held in *Tucker* v. *United States*, (151 U. S., 164), where the court, quoting the language of section 860, said:

> "Discovery or evidence obtained from a party or witness by means of a judicial proceeding" includes only facts or papers which the party or witness is compelled by subpœna, interrogatory, or other judicial process to disclose, whether he will or no; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced. The clause as to discovery or evidence is conceived in the same spirit as the Fifth Amendment of the Constitution, declaring that no person shall be compelled in any criminal case to be a witness

against himself; and as the act of March 16, 1878, c. 37 (20 Stat., 30), enacting that a defendant in any criminal case may be a witness at his own request, but not otherwise, and that his failure to make such request shall not create any presumption against him. *Boyd* v. *United States*, 116 U. S., 616; *Wilson* v. *United States*, 149 U. S., 60; *Lees* v. *United States*, 150 U. S., 476. [~~This sentence is unended in the report, but its purport is clear.~~]

See also *United States* v. *Kimball* (117 Fed. Rep., 156). In that case it was held that evidence voluntarily given by a witness before the grand jury, which was investigating the failure of a national bank, could be made the basis of an indictment against him (the president) without violating section 860.

Upon the proposition that it is for the court and not the witness to determine whether a direct answer to a question will tend to criminate the witness, I desire to call the court's attention to the following cases in addition to those cited in the original brief:

Wyckoff, Seamans & Benedict v. *Wagner Typewriter Co.* (99 Fed., 158).

Foot v. *Buchanan* (113 Fed., 156).

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

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In re BALLMAN.

OPINIONS BY LURTON, J., IN U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

OPINION OF JUDGE LURTON.

It is to be borne in mind that I am not sitting as upon an appeal or writ of error from the order made by Judge Thompson. This is simply an application to me, as one of the Judges of the Circuit Court, to inquire into the validity of the action of a judge of co-ordinate jurisdiction in ordering the commitment of the petitioner for a refusal to obey the order of the Circuit Court.

In such a case, the only inquiry admissible is, whether, in making the order imposing the punishment, the Court acted within its jurisdiction. If the Court did not exceed its jurisdiction, that is an end of the matter, upon this kind of hearing. If, having jurisdiction, the Court erred in law or fact, that must be corrected by a writ of error to the Circuit Court of Appeals, or to the Supreme Court of the United States, as the case may be.

The findings of fact, if the Court had jurisdiction, are not open to review on a writ of habeas corpus; but when, as in this case, the contention is that the Court exceeded its jurisdiction, it is admissible to examine the record of commitment including the evidence, if made part of the record by bill of exceptions, or other

order of the Court, to see whether jurisdiction existed to make the order which has been disobeyed.

If jurisdiction depended upon evidence of a state of facts, then the absence of any evidence which would justify the order made, would demonstrate the failure of jurisdiction and render the order of commitment void.

There are two distinct and separable orders complained of:

1. There is the order to produce a particular cash book. The objection to this order is, as I understand it, that a subpena *duces tecum* which issued on the 7th day of April, is claimed to have required him to produce a cash book showing transactions under the name of A. Smith and A. Johnson, during the months of December, 1904, and January and February, 1905, and it is urged that no evidence appears that petitioner ever had in his possession or under his control any such cash book showing transactions with Smith and Johnson; that the order disobeyed and for which the petitioner stands committed, had no broader basis than disobedience of the subpena of April 7th.

There might be some room for the contention, if the witness had simply denied that he had any book showing any such transactions; but when the defendant appeared before the grand jury in pursuance of this subpena upon the 7th day of April, he failed then to produce the cash book desired and inquired of by the grand jury. Thereupon, the grand jury prepared a charge of contempt. Now, this is the first complaint

of the grand jury; and this was made on the 7th day of April:

> "The grand jury for the April term respectfully represents to Your Honor and charges that John W. Ballman is guilty of contempt of court in this, to-wit: that upon the 7th day of April, A. D. 1905, a subpoena in due form was served upon said John W. Ballman, commanding him to appear forthwith before this Court and said grand jury, to give testimony concerning a certain matter then under investigation before said grand jury and to produce at said time and place the cash books, ledgers, letter-press copybooks and sheets showing the transactions as conducted under the names of A. Smith and A. Johnson with said John W. Ballman, during the months of December, 1904, and January and February, 1905.
>
> "Said John W. Ballman appeared before said grand jury in obedience to said subpoena, but failed, and still fails and refuses to produce before said grand jury the aforesaid books and papers.
>
> "The said papers and books are material to an investigation being conducted before said grand jury."

Now, upon the basis of that report made by the grand jury to the Judge of the Circuit Court, this order was made:

> "This day came the grand jury for the April term and presented its charges of contempt of Court against John W. Ballman, in writing, signed by the foreman of said grand jury.

"Thereupon came into open court the said John W. Ballman, in person and by his counsel, and thereupon the Court ordered and directed said John W. Ballman forthwith to produce all books and papers pertaining to the business in which he is engaged, whether as an employer or manager or proprietor—the business with which he is connected,—all books and papers within his control.

"It is now directed that the above order be entered upon the journals of this court as of April 7, 1905."

Now, upon the next day the grand jury again reported:

"The Grand Jury for the April Term, 1905, respectfully represents to Your Honor and charges that John W. Ballman is guilty of contempt of court in this, that—

"Whereas, on the 7th day of April, A. D. 1905, said Ballman was duly served with subpena to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpena to produce a certain cash book used in his business, did, on the 7th day of April and also upon the 8th day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce said cash book.

"That the said John W. Ballman, on the 8th day of April, 1905, while giving certain testimony before the said grand jury while under process of this court so to do wilfully and knowingly refused to answer certain questions pertaining to said investigation and material thereto,"—

—passing over those questions for the time being. Thereupon, evidence was heard and the Court made the order of April 8th. Now that order is in these words:

"The charges of contempt presented by the grand jury upon the 8th day of April, 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the Court finds that the said John W. Ballman is guilty of contempt of the process and orders of this Court, as charged in said information filed by said grand jury, in the following particulars, to-wit:

"First: That the said John W. Ballman has knowingly failed and refused to produce to and before said grand jury a certain cash book used by him in the conduct of his business and which said cash book is in his possession or under his control.

"Second: That the said John W. Ballman has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

> "Wherefore, it is considered, ordered and adjudged by the Court that said John W. Ballman produce the said cash book and answer the questions set out in said charges of contempt, at twelve o'clock, noon, Monday, April 10th, 1905, before said grand jury, and in default thereof, that he be committed to and confined within the jail of Miami County, at Troy, Ohio, until he complies with the order of this Court, or is discharged by due process of law."

Now, on the 10th of April, the grand jury made a third report:

> "The Grand Jury for the April term, 1905, reports that John W. Ballman appeared as a witness before this body April 10, 1905, at 1:30 o'clock P. M., and failed and refused to produce the cash book referred to in Your Honor's order of April 8th, 1905. Said witness also refused to answer the questions as specified in the charges against him and referred to in said order of Court."

This was followed by the order of April 10, committing Mr. Ballman until he should purge himself of contempt.

The order of April 8 and the order of April 10, plainly referred to a cash book used in the business of the witness, concerning which he had been examined. Touching that book, the witness before the grand jury said:

"Will you state what he said—" I am reading from the examination of the foreman of the grand jury be-

fore Judge Thompson, as to the testimony of the witness Ballman before the grand jury—

> "Will you state what he said with reference to a cash book being used in his business, during the months of December, 1904, and January and February and March and up to April 6th, 1905?"

Passing over objections made to the competency of the question, the Court ruled him to answer. The witness answered:

> "The question was asked and he said there was no such book, to his knowledge."

But in respect of this book, other evidence was heard by the grand jury and heard by Judge Thompson from certain of Ballman's clerks or co-employes, which evidence tended to show that prior to Monday, April 3, there had been a cash book used in the business, upon which entries of cash received and cash paid out, had been made.

I will not undertake to state what this evidence was; it was descriptive of the character of book, the size of it, length of it, breadth of it, the kind of entries made upon it and by whom the entries were made. This evidence strongly tended to show that the petitioner had had a cash book which had been used in his business during the months of December, 1904, and January, February, March and down to April 3, 1905, and that this book was still either in his possession or under his control. Its loss or disappearance was not claimed by the witness, the petitioner, nor by

any of the witnesses examined in respect to it. It had disappeared from the office desk, and in the light of this evidence, most of it unwilling evidence from those associated with the petitioner in business, such a book was in his office upon April 3, and had been there for an indefinite time prior thereto. The Circuit Court might well assume that that book was still in the possession or under the control of Mr. Ballman. It certainly made a case in which he was called upon to show, if such was the fact, that the book described in the evidence, to which the order of April 8 and the order of April 10, referred, had been lost or destroyed after the date when it was last seen in Mr. Ballman's possession, or in his office.

I am not able to see that the order of April 7 was so broad as to be void under the Fourth Amendment, concerning unreasonable searchs and seizures. Thar order must be construed, interpreted and read in the light of the proceedings and of the inquiry which had been made before the grand jury of him, and of the requirement of the subpena *duces tecum*. No objection was then made upon the ground that it was an unreasonable search or seizure; he did produce his other books and papers used in his business, except only a cash book which had also been used in his business.

The subsequent order of April 8, was limited to this cash book, the cash book to which the evidence before Judge Thompson and the evidence before the grand jury, had been directed, and that order is the order which the petitioner has disobeyed and for which he stands committed.

My conclusion therefore is that Judge Thompson did not exceed his jurisdiction by requiring the production of a book, which, evidence showed to be in the possession or under the control of the petitioner.

Now, the question of privilege: I am unable to see that a direct answer to the questions which petitioner refused to answer will reasonably have a tendency to criminate the witness. Now, those questions are as follows:

> "State what, on Account No. 140, Sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to-wit: No. 349/349, 349, 349, 349 and 351, refer to?
>
> "Do not these figures 349, in your handwriting, on Account No. 140, refer to the folios in your cash book in use in your business in January, 1905?"

Now, the witness declined to answer these questions upon the ground that an answer would have a tendency to criminate him.

I am satisfied with the view of the law as laid down by Circuit Judge Taft, in a similar case to this, in which he was hearing a case upon a writ of habeas corpus, the case of *Ex Parte* Irvine [74 Fed. 954] where he said a witness cannot avoid answering any question by the mere statement that the answer would tend to criminate him, without regard to whether the statement is reasonable or not. On the contrary it is for the judge, before whom the question arises, to decide whether an answer thereto may reasonable have

a tendency to criminate the witness or to furnish proof, an element or a link in the chain of evidence necessary to convict him of crime.

And so Chief-Justice Marshall stated the rule to be as follows:

> "When a question is propounded it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be * * * because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims."

Now, a direct answer to the first question would be an answer to the inquiry as to what, on Account No. 140 of this big ledger—that refers to one of petitioner's books used in his business, which he did produce, a ledger then in use in his business—what these figures under the word "Folio" on the debit side of the account refer to. Folio 349, 349, 349, 349, 349 and 351 are the figures.

Now, in what way will a direct answer to that question reasonably tend to criminate the witness? Plainly it is intended to elicit an explanation of what book is referred to, or what slip is referred to by these figures under the word "Folio" and no direct answer possibly or reasonably could furnish a link in a chain of

evidence. Now, that that is the meaning of that question is plainly indicated by the other—"Do not these figures in your handwriting refer to the folios in your cash book?" He could answer that but in one of two ways—yes or no; they either do refer to the cash book, or they do not, and it undoubtedly is intended to elicit the same result—do these figures refer to the pages of another book? The first is, what book in plain meaning—for we must interpret the questions also in the light of the kind of inquiry which was being made; this witness had been asked to produce a certain book; he had said that that book did not exist to his knowledge, and now that answer is being tested by further questions growing out of certain entries, in his own handwriting on another book which he had produced. Of course, it is obvious that a witness who has answered a question in one way, cannot say, "If I am further questioned, if I am further examined about that matter, I may criminate myself by making inconsistent answers." That would permit every witness to close his mouth when he found himself about to be cornered.

I therefore come to the conclusion that a direct answer to these two questions would not reasonable tend to implicate the petitioner or criminate him.

Now, something has been said about the indefiniteness—the indefinite character of this order of contempt. I think that order of contempt is a commitment until he shall obey the order of the Court, which order of the Court is, that he shall appear before the present grand jury and produce to that grand jury the book

inquired about, and answer the questions which he has declined to answer. When the sessions of that grand jury end, this order of commitment is at an end, because he cannot then purge himself of contempt. The Court, instead of committing him for a definite time, thirty, sixty or ninety days, as a punishment, has chosen to commit him until he shall appear and answer, and he is only to appear and answer—when he will have purged himself of contempt; and if the opportunity to appear and to produce the book and answer, the questions, is gone, by the dissolution of that grand jury, the order of commitment is at an end.

I therefore direct that the writ of habeas corpus be denied and that the petitioner be committed to the custody of the marshal.

OPINION OF JUDGE LURTON.

This matter comes on again to be heard upon an application by the petitioner, Ballman, for an appeal to the Supreme Court of the United States on the judgment of the Circuit Court remanding him to the custody of the marshal.

I think the case is one that is appealable direct to the Supreme Court of the United States, because it is a case arising under the constitution of the United States, and therefore, falls under Clause four of Section five of the Judiciary Act of 1891.

There is also an application that pending this appeal, petitioner be admitted to bail. Now, a proceeding under a writ of habeas corpus, is a proceeding *sui generis*, and there are special provisions of the statutes of congress which regulate a litigation of this character. Sec. 761 provides that—

> "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Then Sec. 763 provides that—

> "From the final decision of any court, justice, or judge inferior to the circuit court upon

> an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard."

Of course that means when a case is being heard before a district court and under an old provision, by which the circuit court had a certain limited appellate power over the district court; but Sec. 764 provides that—

> "From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the last clause of the preceding section."

Now, Sec. 765 provides:

> "The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the case."

Now, the Supreme Court have adopted a rule which as far as it goes, is a regulation under Sec. 765, and it has been pressed upon me by counsel who represent the government in this case, that under that the appellant is not entitled to bail—that rule being No. 34, with respect to the custody of prisoners, as follows:

Writ of habeas corpus:

> "Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed."

And the second clause of that rule:

> "Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided."

Now, this case does not fall under the first clause of Rule 34, which to read it again, is as follows:

> "Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed."

Now, if I had not granted the writ of habeas corpus in this case, the custody of the prisoner, with the marshal of this court, would, under this rule, not be disturbed; he would be in custody by virtue of the order of the district court committing him to the marshal; but the writ of habeas corpus was granted; therefore, it comes under the second clause, which I have read.

Now, no other provision has been made by the Supreme Court, under Sec. 765, but under that section, he may be enlarged under recognizance, subject to

provisions hereinafter made—which have not been hereinafter made, but may be made in default of provisions or regulations made by the Supreme Court, by the court or judge hearing the case.

Now, in the case of Roberts v. Reilly, a question of similar character came before Judge Spear for the court of the southern district of Georgia, and he allowed an appeal to the Circuit Court, which was then admissible under the law, upon certain regulations, upon certain conditions, and that order that he then made is found in the case of Roberts v. Reilly, 116" U. S., 80, and it met with the approval of the Supreme Court—because the case went subsequently to the Supreme Court, upon appeal from the judgment of the Circuit Court—and the Court there considered the whole subject of the peculiar character of appeal of habeas corpus proceedings. The Court say:

> "This statutory provision evidently contemplates the summary character of proceedings under the writ of habeas corpus as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such regulations and orders as may seem best adapted to secure the speediest and most effective justice."

It is therefore my conclusion in this case that I have the authority and the power to allow an appeal, under

conditions and regulations; and the authority and the power to allow the petitioner to go upon bail, pending that appeal.

Now, I have considered the suggestion that this appeal, if allowed, operates to defeat the ordinary course of justice; that the grand jury is in session, and that there must come a time when its sessions must have an end, and that the order which is complained of in the writ of habeas corpus is an order requiring this petitioner to appear and produce a certain document and to answer certain questions, and that the object of justice may be defeated if this appeal be allowed. Of course that cannot affect the question. The law has no regard for persons. If the petitioner is entitled to an appeal it does not make any difference what the consequences are—he must have the law administered, so far as it is, favorably to him, and justly, whether favorably or unfavorably; so the appeal must go, but I have the right to allow it upon conditions; and upon the question of bail, I do not think there is any absolute requirement—using the word "absolute" in its most significant sense—that he shall be allowed to go upon bail pending the appeal; but the statutes of the United States are framed upon the theory that one charged with an offence, convicted of crime or disobedience of an order of the court, is entitled, pending a final hearing in whatever court he may choose to take it, which has jurisdiction—until it is finally determined that he is guilty, or that he must obey the order of the court—the whole theory of the

statutes of the United States is that such person shall go upon bail.

The Circuit Court of Appeals of this circuit have had that question under consideration in the case of McKnight v. United States, 113" Federal Reporter, 451, in which the statutes upon the subject of bail pending writs of error, on conviction of crime, have been considered. In that case, where bail pending a writ of error to the Circuit Court of Appeals was denied by the trial judge, an application for bail was made to the Circuit Court of Appeals, and in consideration of the whole theory of the statutes of the United States that such persons shall not be confined if they are able to give sufficient security for appearance until the case shall finally and ultimately be determined, we admitted him to bail in that case. We only gave expression to the principle laid down by Mr. Justice Gray, in the case of Hudson v. Parker, where he said:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and trial, but after conviction, pending a writ of error."

Now, heartily concurring in that statement and that construction of the statutes of the United States, I think it is just as applicable to a case arising under the writ of habeas corpus as it is to a case that comes up under a writ of error; and therefore, having regard to

the power of the court to make regulations, and looking to the peculiar character of such a case as this, I direct that an appeal be allowed, upon conditions: That this appellant shall file in the Supreme Court of the United States within ten days from this date a full transcript of this record, and that in the meantime he be committed to the custody of the marshal, and that he may execute a bond in the sum of five thousand dollars before the clerk of the circuit court, conditioned to abide by the judgment of the Supreme Court in this case—until the determination of the questions arising under appeal to the Supreme Court of the United States; but putting this condition upon the allowance of this appeal, namely: That he shall file this transcript within ten days of this date, and that court may, if it see fit, advance the hearing of this case so that speedy justice may be had, and a final determination of the constitutional questions herein involved may be had. An order will be drawn accordingly in the habeas corpus proceeding.

Now, an application has been made for a writ of error to the Supreme Court of the United States in the case of the commitment of John W. Ballman in the District Court. That application is made to me as one of the Circuit judges of this circuit. That judgment upon which this writ of error is sought to be taken, is a judgment of the District Court, and that is a very distinct court from the Circuit Court. I am not a judge of the District Court for the Southern District of Ohio; I have no authority to sit in that court. Rule 36 of the

Supreme Court of the United States, has been cited, as prescribing that a writ of error or an appeal may be allowed, in term time or in vacation, by any justice of this court (that is, the Supreme Court), or by any circuit judge within his circuit, or by any district judge within his district, from the circuit Court or the district court direct to the Supreme Court, and it is insisted that under that rule, a circuit judge has power and authority to grant a writ of error. If that power and authority exist to grant a writ of error to the Supreme Court of the United States, it exists wholly by virtue of this Rule 36; that is its only authority. I doubt very much whether a proper interpretation of that rule is intended to confer upon circuit judges—to say nothing of the question as to whether the Supreme Court can, by rule, delegate to a circuit court judge, authority to grant a writ of error to that court. In contemplation of law, a writ of error issues from the appellate tribunal to the subordinate tribunal. If I were a member of the Supreme Court, I might, as a member of that court, grant a writ of error—if this were an application for a writ of error—to the Circuit Court of Appeals; I might, as a member of the Circuit Court of Appeals, grant a writ of error to the Circuit Court; and if I were a District Judge I might grant a writ of error to the Supreme Court of the United States, or to the Circuit Court of Appeals; but I have grave doubts whether I have authority as one of the Circuit judges, to grant a writ of error the Supreme Court

of the United States; I therefore decline to do that; I leave that matter to be determined by Judge Thompson. It is not a matter of significance whether it is granted today or Monday, because the absence of Judge Thompson from the city is the only reason given for coming to me with this application for writ of error. We all know that his absence at Columbus is only a short one, and inasmuch as Mr. Ballman will be under an appeal bond in the writ of habeas corpus and be out from under the authority of the order of commitment, it is not significant or a matter of any moment to the petitioner whether he now has a writ of error allowed from the District Court, or not. I therefore decline to act upon that, because it is a matter of no great importance whether it be allowed today or Monday, in view of my ruling upon the other question.

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